

CASCADE HOLISTIC ECONOMIC CONSULTANTS ET AL.

IBLA 80-34

Decided December 18, 1981

Appeal from decision of the Oregon State Director, Bureau of Land Management, implementing 10-year timber management plan for the Josephine Sustained Yield Unit (Medford District Oregon).

Appeal dismissed in part, decision affirmed.

1. Administrative Procedure: Generally -- Appeals -- Rules of Practice: Appeals: Dismissal -- Secretary of the Interior

The Board of Land Appeals is without jurisdiction to review and decide the validity or legality of that portion of a State Director's decision which implements an order issued personally by the Secretary of the Interior in his capacity as chief executive officer of the Department and the appeal will be dismissed insofar as it relates to this issue.

2. Administrative Procedure: Administrative Review -- Federal Land Policy and Management Act of 1976: Environmental Quality -- National Environmental Policy Act of 1969

Where after completion of a final environmental statement covering the Josephine Sustained Yield Unit 10-Year Timber Management Plan, the State Director issues a decision implementing one of the alternatives in the EIS, an appeal disagreeing with certain portions of the EIS will be duly considered with regard for the public interest. However, where appellants seek to have their judgment substituted for that of the decisionmaker, the decisionmaker's action will ordinarily be affirmed in the absence of a showing of compelling reason for modification or reversal.

APPEARANCES: Randall O'Toole, Eugene, Oregon, for appellants; Leonard B. Netzorg, Esq., Portland, Oregon, for intervenors; Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Cascade Holistic Economic Consultants (CHEC) ^{1/} has appealed from a September 4, 1979, decision of the Oregon State Director, Bureau of Land Management (BLM), implementing a 10-year Timber Management Plan for the Josephine Sustained Yield Unit (JSYU) in southwestern Oregon. Appellants contend, in essence, that the timber management plan involved in the BLM decision violates the Act of August 28, 1937 (O&C Act) (pertains to revested Oregon and California Railroad land grant lands in western Oregon), the Federal Land Policy and Management Act of 1976 (FLPMA), the National Environmental Policy Act of 1969 (NEPA), and the BLM manual. For the reasons stated below, we reject appellants' arguments.

The action appealed was taken after completion of an environmental impact statement for the project entitled "Final Environmental Statement: Josephine Sustained Yield Unit 10-year Timber Management Plan (EIS)." The State Director's decision summarizes the action proposed by the EIS and each of seven alternatives proposed therein. The proposed action is described as the "Continuation of Non-Declining Even-Flow Policy." Under this policy, the sustained yield capacity of the land (or annual growth of the forest) fixes the upper limit of the timber harvest level. Under even flow, the higher the expected growth, the higher will be the harvest level to assure an "even flow" of timber to industry and public.

The State Director's decision did not implement the proposed action. Instead, the decision implemented "Alternative No. 4 -- Utilization of Surplus Inventory." Under this alternative there is a departure from the even-flow policy in that the allowable cut is temporarily increased for one decade by accelerating the harvest of overmature timber.

The decision appealed from followed a decision of the Secretary of the Interior dated May 28, 1979, directing the harvest of surplus timber constrained by sustained yield capacity. Portions of the State Director's decision pertinent to the appeal provide as follows:

Non-declining, Even-flow Allowable cut Policy. The BLM's basic policy has been and continues to be, to plan for a non-declining harvest level over time. However, in some instances, there is an excess of presently existing

^{1/} Randall O'Toole initiated this appeal on behalf of CHEC, Headwaters, and the Oregon Wilderness Coalition.

merchantable timber volume over and above that which is needed to provide a long-term non-declining harvest regime. On May 28, 1979, the Secretary of Interior, in response to the President's directive to seek ways to increase timber production on federal lands, [2/] adopted a revised policy which allows this excess volume to be utilized to provide for short-term increases over the nondeclining level. * * *

* * * * *

Alternative No. 4 - Utilization of Surplus Inventory

This alternative would temporarily increase the allowable cut for one decade by accelerating the harvest of overmature timber. This can be accomplished without subsequently dropping below the allowable cut level set under the even-flow policy as described in the Proposed Action. Under this alternative, the annual harvest level would be 21.2 MM cu. ft. (108 MMBF) for the first decade (18.3 MM cu. ft. allowable cut + 1.1 MM cu. ft. accelerated old-growth harvest + 1.8 MM cu. ft. trial harvest program). At the end of the first decade the accelerated old-growth harvest would cease but the 18.3 MM cu. ft. (94 MMBF) level is sustainable from that point on.

* * * * *

National Goals - The timber supply situation, and its attendant effects on housing costs, etc., has attracted nation-wide attention. The President has issued a mandate for increased timber production from federal forest lands. Following a determination that a departure from nondeclining even-flow harvest scheduling is consistent with the sustained-yield requirements of the O&C Act, this mandate was implemented in BLM by the Secretary. Of the alternatives remaining under consideration, Alternative #4 is the most responsive to national timber production guidelines.

* * * * *

2/ A June 12, 1979, directive by then President Carter provided:

"MEMORANDUM FOR THE SECRETARY OF THE INTERIOR

"I hereby direct the Departments of Agriculture and Interior, consistent with existing legal requirements, to use maximum speed in updating land management plans on selected Bureau of Land Management lands with the objective of increasing the harvest of mature timber through departure from the current nondeclining even-flow policy. In updating land management plans, all relevant economic and environmental implications must be taken into account. A schedule for rapid completion of this process on those lands with substantial inventories of mature timber should be developed with regular progress reports to me."

V. RECOMMENDED DECISION

Alternatives #1 and #3 are the most desirable from an environmental standpoint.

However, their environmental superiority to Alternatives #2 and #4 and the Proposed Action is not of a sufficient magnitude to warrant the impacts on jobs and the local economy that their adoption would entail.

Therefore, it is my recommendation to adopt Alternative #4 - Utilization of Surplus Inventory, but to modify this alternative by adopting the substitute herbicides to replace Silvex as described in Alternative #2. Specifically:

- approved substitute herbicides will be used in place of Silvex
- mechanical and manual vegetative control methods will be thoroughly and fairly considered in accordance with the Director's instructions.

Alternative #4 is consistent with the criteria set forth in the Director's instructions [sic] regarding deviation from the non-declining even-flow policy.

Furthermore, I propose that:

- The mitigation measures as described in Chapter 1 and Chapter 4 of the Josephine E.S., represent the most reasonable and practicable means to minimize or avoid environmental harm and should be adopted and implemented.
- The use of these mitigation measures, as well as the technical assumptions and land-use plans on which the allowable cut level is based, be monitored so that consistency is maintained during the upcoming decade.
- The applicable land-use decisions contained in the Management Framework Plan (MFP) be adopted and implemented.
- The trial harvest program be implemented. There is a total of 55,675 acres of Low Intensity lands which district silviculturists feel can be regenerated after final harvest. The time it would take to regenerate is unknown, but it is estimated to be in excess of 5 years. The cooperative Forestry Intensified Research (FIR) project will specifically use these sites as a geographic base for field studies and research projects. In order to give the researchers a full range of site conditions to work with it was estimated that trial harvest activities would have to be carried out on about 10% (or, 5,000 acres) of this total land category during the first decade.

Under this proposal, the annual timber yield for the decade would be:

Annual Productive Capacity	- 18.3 MM cu. ft.
	(94 MMBF)
Harvest of Surplus Inventory	- 1.1 MM cu. ft.
	(5 MMBF)
Yield from Trial Harvest	- 1.8 MM cu. ft.
Program	____ (9 MMBF)
	21.2 MM cu. ft.
	(108 MMBF)

I recommend implementation on the Josephine Sustained-Yield Unit effective October 1, 1979.

On November 13, 1979, the Acting State Director filed a motion to place the timber management plan into effect pending resolution of this appeal. By order dated December 31, 1979, the Board placed the decision appealed from into effect pending final resolution of the appeal. In so ordering, the Board stated:

It appears from the record that the part of the decision to utilize the timber management plan which provides for the temporary deviation from even-flow harvesting by accelerating the harvest of overmature timber for the first decade is an implementation of the prior Secretarial decision. The decision of the Secretary of the Interior dated May 28, 1979, was to accelerate temporarily the harvest of overmature timber by cutting up to, but not in excess of, the sustained yield capacity, and to reduce thereafter the harvest to the even-flow level. This Board has no jurisdiction to entertain an appeal from a decision of an officer of the BLM which has been approved by the Secretary. 43 CFR 4.410.

[1] Appeals involving BLM actions implementing Secretarial directives are routinely dismissed for lack of jurisdiction by the Board. See Texas Oil & Gas Corp., 46 IBLA 50 (1980). As was pointed out in the order in Walter D. Monger, IBLA 80-576 (May 6, 1981), see Appendix, jurisdiction to consider such an appeal might vest if there is some demonstration that BLM's action is inconsistent with the Secretarial decision. Concerning the issue of departure from even-flow timber harvesting in the case at bar, there is no indication of such inconsistency. Accordingly, to the extent that it addresses this issue, the appeal before us is dismissed.

Before proceeding to the remaining elements of the appeal, we address certain preliminary points made in BLM's answer and motion to dismiss. 3/ BLM asserts therein that CHEC has no standing to bring the

3/ Intervenors herein, who have also filed a brief, are the Southern Oregon Industries Association, Northwest Timber Association, and Western Forest Industries Association.

appeal, suggesting that the action might more properly have been brought as a protest. BLM also questions the qualifications of Randall O'Toole, who is not an attorney, for representing CHEC and the other appellants. ^{4/}

It is true that the appeal herein would more accurately have been styled as a protest and treated as such under 43 CFR 4.450.2. That regulation provides that "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." The regulation governing notices of appeal, 43 CFR 4.410, permits appeals only by "any party to a case who is adversely affected" by the decision. The distinction between an appeal and a protest and the reasons therefor were set forth in California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). Therein we stated:

[T]he purpose of the requirement that an individual be a "party to a case" before a notice of appeal to this Board will lie is not to limit the rights of those who disagree with the Bureau actions, but to afford a framework by which decisionmaking at the departmental and State office level may be intelligently made.

If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its actions. On the other hand, when an individual appears for the first time to object to proposed actions, treatment of this person's objections as an "appeal" effectively forecloses any consideration by the local authorized officer of the merits of the objection, since this Board has consistently held that upon the filing of a notice of appeal the State Office loses all jurisdiction over the matter being appealed. In this latter situation, the Board is, in effect, forced to make an initial decision, even though it is vested with appellate authority. [Emphasis in original.]

Id. at 385. See also Cascade Holistic Economic Consultants, 58 IBLA 332 (1981); Elaine Mikels, 41 IBLA 305 (1979); Duncan Miller (On Reconsideration), 39 IBLA 312 (1979).

^{4/} The file contains correspondence identifying Mr. O'Toole as executive secretary of the Oregon Wilderness Coalition and as staff forester of CHEC. 43 CFR 1.3(b)(iii) provides that an individual not otherwise entitled to practice before the Department may practice in connection with a particular matter on behalf of an association if the individual is an officer or full time employee thereof.

However, to remand the appeal for treatment as a protest at the present stage of the proceeding would be an exercise in administrative futility. See Julie Adams, 45 IBLA 252 (1980).

We turn now to those portions of appellants' statement of reasons directed to matters other than the departure from even-flow timber harvesting.

The first such matter relates to harvesting timber from "low intensity" lands endorsed by the State Director's decision. Low intensity lands are defined as lands "capable of growing in excess of 20 cubic feet of commercial coniferous species per acre per year." The regeneration period for such lands is projected to be in excess of 5 years (EIS at 1-5, 1-6). The objective of the trial harvest program from low intensity lands is to "determine what practices might be effective to facilitate regeneration within the prescribed 5-year period, and to gather empirical data on the actual regeneration period. No sustained yield allowable cut is proposed for the low intensity lands" (EIS at 1-6).

One of the appellants' objections is the assertion that low intensity harvest does not comply with sustained yield. Appellants express the fear that there is no guarantee that low intensity land can become naturally reforested. The text of the EIS should serve to allay appellants' apprehension. It states at 1-21:

The proposed annual harvest of 1.76 million cubic feet from the 55,675 acres of low intensity lands is based solely on a 10-year projection period. It cannot be viewed as sustainable in context with allowable cut calculation procedures previously described. Future decade levels would be dependent upon the results of the trial program.

Whether regeneration takes more or less than 5 years, it is likely that the impacts will be similar. Appellants' concern was adequately considered and provided for in the EIS.

Appellants also assert that the low intensity harvest proposal is contrary to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), and to provisions of the BLM manual. The answer is that 43 U.S.C. § 1737(a) (1976) explicitly authorizes the Secretary to conduct investigations, studies and experiments "involving the management, protection, development" of the public lands. The proposal before us is precisely such an undertaking. Appellants merely voice divergent opinions; they do not show wherein the proposal is arbitrary or in any way ill-considered.

Appellants' assertion that harvesting timber from low intensity land is contrary to the BLM manual is not persuasive. Appellants cite BLM manual section 5240.06(F)(2) which provides that the allowable cut level must include the volume from all planned timber harvesting practices. This provision must, however, be read in context with section 5240.06(E)(1), which states in part that "the allowable cut must relate

only to forest land judged to be environmentally and economically suitable for the continuous production of timber." Appellants have not controverted the statement in BLM's answer to the effect that BLM's current policy does not include low intensity volume in allowable cut. 5/

The next topic on which appellants express misgivings is the fertilization of 18,900 acres that will undergo thinning. Appellants challenge the factual data in the EIS, objecting to various assumptions, projections, and hypotheses based thereon. They contend essentially that there is no evidence that fertilization will increase the growth of timber in the JSYU. They contend, inter alia, that there are experts who disagree with the BLM's experts, that the research is inadequate, and that the proposal violates the BLM manual.

Appellants' assertions as to shortcomings of the data and inadequacy of research are inaccurate. Their major objection is that fertilization will not "increase" growth. However the "increase" of growth is not a stated objective of the fertilization plan. (See EIS at 1-34, 3-49.) What the EIS does project is "an acceleration of growth for up to several years following fertilization." Technical researches and studies conducted by various parties are discussed and summarized on pages 13 through 15 of BLM's answer. Also discussed are BLM's research based estimates of percent response to fertilization. Appellants' concerns are basically with the adequacy or sufficiency of the EIS. Similar concerns were advanced in Cady v. Morton, 527 F.2d 786 (9th Cir.

5/ Even if there were a lack of consistency between BLM manual provisions and the proposals here challenged, there has been no showing to what extent, if any, the cited provisions would be controlling. A thorough discussion of this issue, as it concerns BLM's statutory National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976), mandate is found in Lane County Audubon Society, 55 IBLA 171 (1981), where the Board observed:

"In Elaine Mikels, * * * [44 IBLA 51 (1979)], we characterized the provisions of BLM Manual section 1791 as 'guidelines.' They are not the type of material required by 5 U.S.C. § 552(a)(1)(D) (1976) to be published in the Federal Register. They do not prescribe any rule of law binding on BLM. They are not intended and were not written to require strict conformance with their terms. Rather, they permit a flexible approach in the preparation of environmental analyses, considering a multitude of variable factors. The present case is distinguishable from Gulf States Manufacturers, Inc. v. NLRB, * * * [579 F.2d 1298 (5th Cir. 1978)]. In that case the NLRB failed to comply with internal procedures required to be published in the Federal Register. In this case we find that BLM complied with the section 1791 guidelines and that such guidelines were not required to be published in the Federal Register. The ultimate safeguard to ensure adequate consideration of the environmental factors at stake in a timber sale is not the BLM Manual but the judicially [sic] enunciated doctrine in Hanly v. Mitchell, * * * [460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972)], which requires taking into account all relevant factors."

55 IBLA at 175-76.

1975), where it was argued that an EIS dealing with the impacts of stripmining was lacking in data and insufficiently analytical. The court's response stated in part at 796:

While we would have preferred a somewhat more detailed and better organized treatment of the proposed reclamation plans and although parts of the discussion are couched in the "conclusory form" we consider less than optimal, we cannot say that the EIS is inadequate in this regard. Nor are we dislodged from this position because of the conflict in expert testimony concerning reclamation procedures and prospects at trial. As was said in Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), "disagreement among experts will not serve to invalidate an EIS." [Footnotes omitted.]

The court further stated:

Neither § 102(2)(B) or (C) [42 U.S.C. § 4332(2)(B) or (C)] can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated. Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973).

Id. at 796.

The appellants' allegation that fertilization is not known to be technically feasible and is therefore in violation of the BLM manual is inconsistent with the EIS and is not supported by the record.

Appellants' remaining challenges are essentially broad based disagreements with information compiled in the EIS. These challenges are largely answered by Cady v. Morton, supra, and appellants' request for relief that BLM should prepare a new timber management plan and EIS is denied.

[2] The EIS is a vast document containing evaluations which are necessarily subjective and judgmental. In preparing such a document BLM is obligated to develop a reviewable record reflecting consideration of "all relevant factors." See Hanly v. Mitchell, supra at n.5. All indications are that this standard was met. BLM's efforts are guided by established procedures and criteria and are conducted by teams of experienced personnel who are often specialized in their respective fields of inquiry. In addition, BLM draws on the knowledge and expertise of academic institutions and other non-Government experts. The findings of BLM personnel are subjected to higher level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that reasonable men could differ over such conclusions. In Richard J.

Leaumont, 54 IBLA 242 (1981), the Board quoted a passage from Rosita Trujillo, 21 IBLA 289 (1975), for a proposition pertinent here:

Appellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such jud[g]ments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modifications or reversal.

Rosita Trujillo, supra at 291.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the appeal is dismissed in part and the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Gail M. Frazier
Administrative Judge

APPENDIX

May 6, 1981

IBLA 80-576	:	BLM Herbicide Spray Program
	:	
WALTER D. MONGER	:	Roseburg District, Oregon
	:	
	:	Appeal dismissed

ORDER

Walter D. Monger has appealed to the Board from the dismissal of his protest against the spraying of phenoxy herbicides on BLM land in sections 5 and 7, T. 28 S., R. 7 W., Willamette meridian. On April 29, 1980, the Associate Regional Solicitor filed a motion to dismiss the appeal because the spring spraying program of the Roseburg District merely implements a decision of the Secretary to use certain herbicides as substitutes for Silvex.

This Board has previously held in Bernie Bernstein, IBLA 80-426 (Mar. 26, 1980), involving an appeal from a decision implementing the Secretarial decision regarding herbicide spraying in Western Oregon that:

The Board of Land Appeals has no jurisdiction to entertain an appeal from a decision of an officer of BLM to use certain herbicides in the context of a final environmental impact statement where the decision to use such herbicides as described in the impact statement has been approved by the Secretary of the Interior. 43 CFR 4.410. See Texas Oil & Gas Corp., 46 IBLA 50 (1980).

Appellant has not demonstrated how BLM's program is inconsistent with the Secretary's decision, which might vest us with jurisdiction over the appeal. As an example, use of a herbicide not specifically approved by the Secretary's Order might well raise questions not controlled by the Secretary's earlier decision.

Because the spraying program merely implemented a decision approved by the Secretary, we find the Board is without jurisdiction to consider the appeal. See 43 CFR 4.410; Michael J. Hess, IBLA 80-507 (June 13, 1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

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